In the Matter of the Impasse Between	)	
	)	
KERN COUNTY HOSPITAL AUTHORITY,	)	
	)	*FACTFINDING REPORT AND*
Public Employer,	)	*RECOMMENDED TERMS OF*
	)	*SETTLEMENT*
- and -	)	
	)	*PERB Case No. LA-IM-237-M*
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 521,	)	*June 24, 2017*
	)	
Exclusive Representative.	)	
	)	

COMPOSITION OF THE FACTFINDING PANEL:

Impartial Chairman:	Robert Bergeson, Arbitrator/Factfinder 13351-D Riverside Drive #142 Sherman Oaks, CA 91423
Employer Member:	Lisa Hockersmith, V.P., Human Resources 1700 Mount Vernon Avenue Bakersfield, CA 93306
Union Member:	Ernest Harris, Region 5 Director 1001 17th Street Bakersfield, CA 93301

FACTFINDING HEARING ATTENDEES:

On Behalf of the Employer:	Adrianna Guzman, Esq., Liebert Cassidy Whitmore Karen Barnes, Esq., General Counsel Brook Wendell, Employee/Labor Relations Manager
On Behalf of the Union:	Matt Gauger, Esq., Weinberg, Roger & Rosenfeld Michael Carter, Organizer Carmen Morales, Chief Steward Cesar Serrano, Researcher

BACKGROUND AND PROCEDURAL HISTORY

This matter concerns the medical facility in Kern County known as Kern Medical Center which contains, contains a 222 bed hospital and the only trauma center for a radius of 75 miles of

Bakersfield. The majority of employees who staff that facility are represented by Service Employees International Union Local 521 (Union). Prior to November 6, 2015, the facility was owned and operated by the County of Kern (County). However, pursuant to an ordinance adopted by the County Board of Supervisors a month prior to that date, ownership and operation of Kern Medical Center were transferred to a new public entity, Kern County Hospital Authority (Authority).

When the medical center was under the jurisdiction of the County, the latter entity had memoranda of understanding (MOU) with the Union which covered most aspects of the wages, hours and other terms and conditions of employment of the members of the 13 Union bargaining units. Following creation of the Authority it was agreed that those MOUs, the effective dates of which are March 28, 2015 through August 27, 2017, would remain in effect for 24 months following the date of transition to the Authority unless modified by mutual agreement.

When the County employed the instant workers, the MOUs did not cover appeals of major discipline and terminations because that process was set forth in the rules of the County's Civil Service Commission. With the advent of the Authority, that commission was divested of such jurisdiction. Accordingly, commencing on April 6, 2016, these parties met several times in an effort to adopt procedures to replace such civil service rules.

Conceptual agreement was reached in all areas save the final administrative step for disciplinary appeals. In that regard the Union proposed from the outset and still advocates that the prior civil service appeal protocol be replaced with binding arbitration. The Authority was and continues to be opposed to that process and on September 15, 2016, it presented the Union with a last, best and final offer (LBFO).

In relevant part the LBFO provided for a two-step disciplinary process. The first step provided for selection of a "hearing officer" whose "proposed decision [would] include findings of facts and conclusions regarding the charges and [would] be advisory to the [Authority's] CEO." The latter individual was to be authorized to "accept, reject or modify the hearing officer's proposed decision, and issue his/her own findings of fact and conclusions." The parties met on November 17 to review and discuss provisions of that LBFO but it proved to be an inadequate basis for settlement so on November 21, the Authority's Board of Governors approved a formal declaration of impasse which was presented to the Union.

On February 13, 2017, the parties met with state mediator Thomas Ruiz in a further effort to reach agreement. Assistance from that third party neutral similarly failed to result in settlement and on February 28, the Union notified the state Public Employment Relations Board (PERB) of its desire to move the dispute to factfinding pursuant to Government Code § 3505.4 (Meyers-Milias-Brown Act or MMBA). From a list of qualified neutrals obtained from PERB, on March 14, 2017 the parties chose Arbitrator/Factfinder Robert Bergeson to serve as chairman of the factfinding panel (Panel). On that same date Lisa Hockersmith was chosen by the Authority to be its member of the Panel with Ernest Harris chosen by the Union to serve as its Panel member.

DISCUSSION

Factfinding is not a quasi-judicial proceeding but rather a quasi-legislative one. As such, there is no burden of proof here as would be the case in arbitration. It has nevertheless been said "the party that is proposing to change the status quo on a mandatory subject of bargaining generally has the burden of persuasion on that topic. If a party proposing a change cannot justify the need for a change, a factfinder will likely recommend that the status quo remain." "Pocket Guide to Factfinding," Stevens, Novotny & Sommer, eds., California Public Employee Relations Journal (Regents of the UC, November 2013) at p. 16. To the extent the Union advocates retention of a system whereby a neutral third party would have final administrative authority over disciplinary appeals whereas the Authority proposes that the neutral's authority would be merely advisory, the Authority carries the burden of persuasion.

Authority's Position

The following is quoted from the Authority's binder.

1. The Authority's last position for maintaining non-binding arbitration is consistent with the County of Kern's disciplinary appeal process that governed employee discipline prior to July 1, 2016. [Citation to the Civil Service Rules omitted.]

2. An arbitrator may issue irrational, unfair and unreasonable decisions and act in excess of authority.

3. There is no right to appeal binding arbitration decisions.

4. Some arbitrators may base decisions on a desire for future employment (selection) rather than the merits of the case.

5. Neighboring agencies (Kern County, Fresno County, Ventura County and Los Angeles County) vest the final decision with their own civil service commission, governing body, or chief executive officer, and provide judicial review pursuant to Code of Civil Procedure section 1094.5.

6. San Bernardino County also vests the final decision with its civil service commission, but does not explicitly state that judicial review is available.

Union's Position

The Union argues that the Civil Service Commission appeals process served the County and the Union well for decades but now the Authority has rejected binding arbitration, a purportedly comparable procedure. The Union's reasoning is that as with a civil service commission, the use of arbitration as the final step for appeals of discharge and discipline allows for review of that decision not via a higher level of management but by an unbiased third party.

During the factfinding hearing the Union presented a list of 83 private hospitals within California which have agreed to binding arbitration. Consistent with the Authority's presentation, the Union has listed a number of public hospitals where disciplinary appeals are made to a civil service commission. According to the Union, in addition to those, binding arbitration is the final appeal process at the following public hospitals: City and County of San Francisco; Alameda County; and San Mateo County.

Recommended Terms of Settlement and Rationale Therefor

The Authority's position as set forth in its hearing binder is a bit puzzling. Perhaps "maintaining" as used in its first paragraph is a misnomer and what was meant was *advocating* "non-binding" or advisory arbitration since one cannot maintain something which did not previously exist. It should also be pointed out that, as will be apparent, the Authority's assertion binding arbitration is entirely unappealable to the courts not does comport with relevant case law.

It is presumed that by use of such terminology the Authority means that when an appeal of disciplinary action is lodged, these parties would agree upon a third party neutral whose title would

be "arbitrator" but whose authority would be limited to recommending findings of fact and conclusions of law to its chief executive officer. Consistent with that presumption, according to the Panel Chairman's notes, among the arguments made by the Authority during the instant hearing in defense of that position was that although the CEO is a management official, his or her decision would still need to be based on evidence presented to the advisory arbitrator. Whatever the case may be, it is the opinion of the Chairman that a process exists which can accommodate not only the Authority's valid concerns but also the Union's trepidation about review of disciplinary decisions by what would at least ostensibly be a less than impartial individual.

It is understandable the Authority is somewhat reticent about the dispute resolution process advocated by the Union since although arbitration of disciplinary appeals may be common to local unions of SEIU, it is foreign to these parties' relationship and the Authority makes a valid point that it should be able to retain some control over the identity of those who review the propriety of disciplinary actions it takes. However, the mere fact some arbitration awards may be grist for criticism is not a reason to paint all arbitrators with the broad brush of incompetence nor to conclude that such awards may have been motivated by a desire for future selection.

The history of labor arbitration is decades long and in the norm highly respected. To quote from the leading treatise on the matter "Arbitration, to use the words of one writer, is a 'simple proceeding voluntarily chosen by the parties who want a dispute determined by an impartial judge of their own selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding'." Elkouri and Elkouri, HOW ARBITRATION WORKS (BNA, 2016), 8th ed., at p. 1-3 (*Elkouri*) quoting from Chappel, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, at pp. 6-7 (1944).

To quote from p. 15 of the sixth edition of *Elkouri* (BNA, 2003),

> Since 1960, the tremendous growth of . . . collective bargaining in the public sector has been accomplished by the rapidly expanding use of arbitration of public-employee disputes. This development has been particularly important because federal and state employees generally continue to be restricted by the traditional prohibition against strikes by public employees. [Footnote.] Neutral dispute settlement machinery is essential in the public sector if organizational and bargaining rights are

to have any real substance. [Footnote.][1]

The MMBA provides no guidance as to what factual criteria should be relevant to the present process. However, among factors included at Government Code § 3548.2(b) in the bargaining stature for public school districts is "Comparison of the wages, hours, and conditions of employment with those provided to other employees performing similar services . . ." That criterion has been implicitly stipulated as useful here since each party has provided evidence of the disciplinary appeal process in various agencies they assert to be comparable.

That comparability evidence fails to support the Authority's position that the administrative appeal process between these parties should be a neutral third party's recommendation to its CEO. Indeed, the record is devoid of evidence that even one California medical facility has such a process. Rather, insofar as it is relevant, the evidence shows that in the private sector all union-represented facilities have binding arbitration and in unarguably comparable facilities run by other governmental agencies disciplinary appeals are made either to a civil service commission or to an arbitrator with final and binding authority. Such evidence therefore weighs in favor of adopting the Union's position. However, so stating is not to be construed as a determination that the Authority's concern about binding arbitration awards is entirely without merit as during the Panel Chairman's long career he has unfortunately been provided - for their supposedly persuasive value - a number of awards which do not speak well of the profession.

Based on the above, the parties should attempt to agree upon a disciplinary appeal procedure which would not end with a decision of a management official on the one hand but which would allow for greater judicial review than is true of most "final and binding arbitration" awards on the other. Use of the approach set forth in the memorandum of understanding between Metropolitan Water District of Southern California (MWD) and American Federation of State, County and

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[1] Insofar as it may be relevant, although the instant employees are not absolutely prohibited from striking, as a practical matter the ability of many to do so is subject to injunction which renders that tool of limited value in relation to their private sector counterparts.

It should further be noted that arbitration has now become so firmly entrenched in the public sector that *Elkouri* appears to no longer even bother with that explanation.

Municipal Employees Local 1902 (AFSCME) would accomplish both such goals.

As discussed in *AFSCME v. MWD* (2005) 126 Cal.App. 4th 247, section 6.7.4 of that MOU provides for appeal to a neutral "hearing officer" whose decision "shall be final and binding on the parties." As the Court of Appeal stated therein, generically speaking, whether a third party neutral chosen to hear disciplinary appeals is referred to as an arbitrator or a hearing officer or by some other term is not dispositive of his or her authority. Rather, it is "the nature and intended effect of the proceeding" which is important. As such, said the court, the AFSCME-MWD process does not amount to binding arbitration as that procedure has been defined in case law.

Where, as under the AFSCME-MWD contract, a neutral third party's decision "is reviewable by a trial court under Code of Civil Procedure [CCP] section 1094.5," it is not final and binding in the usual arbitral sense. That is so, said the Court of Appeal, because under that code section, courts are authorized to decide "whether the decision maker proceeded in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion because of a failure to proceed as required by law, the order or decision was not supported by the findings, or the findings were not supported by the evidence." Therefore, rather than being constrained to decide merely whether substantial evidence supported the factual findings made as would be true under CCP § 1280 et seq. involving binding arbitration, a trial court is "authorized to consider the weight of the evidence" produced.

Although the AFSCME-MWD MOU accordingly contains "a mechanism to assure a minimum level of impartiality with respect to the rendering" of a decision on appeal of discipline taken, under that contract the hearing officer's decision is final and binding only in an administrative sense. Therefore, from a legal standpoint, these parties' adoption of the AFSCME-MWD approach would essentially result in simply the substitution of a mutually determined neutral "hearing officer" for what has been the Kern County Civil Service Commission. Accordingly, even assuming the Authority is correct that binding arbitration awards cannot even be reviewed by a trial court (and that broad assertion does not comport with the holding in *AFSCME v. MWD*) since appeals of a "final and binding hearing officer's decision" as recommended here would be pursuant to CCP § 1094.5, that is irrelevant.

Adopting such an approach is not the only means of mitigating the chances of a poorly

decided internal appeal.

It appeared to the Panel Chairman during the hearing in this matter that there may be some misunderstanding that if these parties employ such a third party neutral, they would somehow be constrained to use any seven-name list of arbitrators provided to them by the California State Mediation/Conciliation Service (CSMCS). That is definitely not so. As examples, the Authority and the Union can develop their own rotational panel of arbitrators if they choose or, if they wish to use the CSMCS panel, when such a need arises they can ask CSMCS to send them only names of labor relations neutrals who have achieved membership in the preeminent organization for the profession, the National Academy of Arbitrators, a status which would be expected to appear on such individuals' resume.[2]

In the interests of brevity and because these parties are represented by competent counsel, rather than replicating the AFSCME-MWD language it has been merely summarized herein. The AFSCME-MWD MOU is nevertheless available here should the parties wish to review it: http://www.mwdh2o.com/MWD_PDF/Careers/5.1_Labor_AFSCME_MOU.pdf#search=mou

The Chairman having so opined, that concludes his comments. The Union's concurrence and the Authority's dissenting opinion follow.

DATED: June 24, 2017

Robert Bergeson
Chairman

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2 For membership requirements see http://naarb.org/member_guidelines.asp

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June 15, 2017

VIA EMAIL AND U.S. MAIL

Arbitrator Robert Bergeson
13351-D Riverside Drive, #142
Sherman Oaks, CA 91423

Re: Kern County Hospital Authority and SEIU Local 521 Factfinding
PERB Case No. SA-IM-237-M

Dear Arbitrator Bergeson:

I am writing on behalf of the Union to indicate that the Union has no changes or rebuttal to your draft report. The Union requests that you issue the report in final within the next few days.

Please contact me if you have any questions or concerns.

Sincerely,

Matthew J. Gauger

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cc: Adrianna Guzman
Clients

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Fact-Finding with
Kern County Hospital Authority and
Service Employees International Union, Local 521
PERB Case No. LA-IM-237-M

Kern County Hospital Authority Representative to the Fact-Finding Panel
Lisa Hockersmith, V.P., Human Resources

Dissent to the Fact-Finding Report and Recommended Terms of Settlement:

As the representative for the Kern County Hospital Authority ("Authority") to the Fact-Finding Panel, I respectfully disagree with the advisory recommendations contained in the Fact-Finder's Report & Recommended Terms of Settlement ("Report"), and for that reason, I am providing this dissenting opinion.

The Impartial Chairman's recommendation, in summary, is that "the parties should attempt to agree upon a disciplinary appeal procedure which would not end with a decision of a management official on the one hand but which would allow for greater judicial review than is true of most 'final and binding arbitration' awards on the other." The Impartial Chairman then references the memorandum of understanding between the Metropolitan Water District of Southern California ("MWD") and American Federation of State, County and Municipal Employees Local 1902 ("AFSCME") as a model for structuring a mutual disciplinary appeal procedure, which provides for judicial review of a hearing officer's decision pursuant to Code of Civil Procedure ("CCP") section 1094.5.

The Authority recognizes and appreciates the Impartial Chairman's efforts in proposing these recommended terms of settlement. The Impartial Chairman's recommendation, however, still does not address the Authority's legitimate concerns in handing final and binding decision-making to an outside party regarding the discipline of its own employees.

The Impartial Chairman opined that allowing an arbitrator's decision to be final and binding only in an administrative sense (yet still subject to judicial review) would "essentially result in simply the substitution of a mutually determined neutral 'hearing officer' for what has been the Kern County Civil Service Commission." There are, however, fundamental differences between an outside arbitrator and the Kern County Civil Service Commission ("CSC"). Unlike a third party arbitrator, the CSC is specifically appointed by the County of Kern Board of Supervisors ("BOS"). Civil Service Commissioners routinely deal with County personnel matters and administer the County's Civil Service System. The BOS maintains control over the CSC. The BOS may remove any member of the CSC during that member's term of office by a four-fifths vote, if the circumstances require. The CSC is essentially an extension of the County. Both are public agencies and bodies subject to internal and external controls for ensuring accountability to the public at large and the local constituency.

As discussed during the Fact-Finding hearing, arbitrators are not accountable to the public in the same manner. The Authority would potentially be subject to irrational, unfair and

unreasonable decisions by handing off final decision-making authority to an arbitrator without any administrative level of review. Some arbitrators may also act in excess of authority and base decisions on a desire for future employment and selection rather than the merits of each case. These are legitimate concerns by the Authority.

The Impartial Chairman suggested in the Report that the quality of the arbitrator could be addressed by (1) the parties developing their own rotational panel of arbitrators or (2) filtering the list of eligible arbitrators sent by the California State Mediation and Conciliation Service to members of a particular organization, such as the National Academy of Arbitrators. The Authority acknowledges that these proposed options may result in increased quality in the level of services and selection criteria of available arbitrators. Ultimately, however, these proposed options still result in the Authority handing off final and binding decision-making to a private third party unaccountable to the public. The Authority's concerns are not fully addressed by these proposed options. The Authority must be able to exercise reasonable discretion in administering discipline to its own employees.

The Authority also does not agree that subjecting an arbitrator's binding decision to judicial review pursuant to CCP section 1094.5 serves as a valid resolution[1]. The Chief Executive Officer's final decision would also be subject to judicial review through the same method. The Authority's concerns for ensuring adequate administrative review of disciplinary matters are not addressed via this method of judicial review.

Accordingly, I respectfully dissent from the Impartial Chairman's recommendation and the Report's suggested terms of settlement.

Lisa Hockersmith
June 22, 2017

[1] As the Impartial Chairman notes in the Report, courts reviewing matters via CCP section 1094.5 decide whether "... the order or decision was not supported by the findings, or the findings were not supported by the evidence." Even in a situation where an arbitrator's decision is in favor of the Authority, the decision may be unsupported by the findings and/or evidence. In this situation, the Authority may reject the decision or take other action to ensure the final decision is defensible if reviewed. It is doubtful the Authority could exercise this level of administrative review if it adopts a binding arbitration procedure. The "final decision" that is appealed to the courts should remain with the Authority as the governing agency.